CHUA KEOK SENG v. WEE ENG YONG.

[O. C. J. (Brown, J.) April 1, 1954]

[Singapore — Suit No. 466 of 1953]

Negligence — Contributory negligence.

This was an action for damages for negligence. The plaintiff was shot by the defendant who was one of a party of three men shooting flying foxes. The plaintiff had been asked to accompany the party because he knew of a suitable place. The plaintiff was shot at a distance of 15 to 20 feet and suffered serious injuries. At the moment when the shot was fired no flying foxes were overhead and none were within shooting range. The defendant called no evidence but it was submitted on his behalf that the plaintiff was guilty of contributory negligence on the ground inter alia that he was a voluntary member of the shooting party.

Held: the plaintiff was not guilty of contributory negligence merely by the fact of his voluntarily joining the shooting party.

Case referred to:—

(1) *Stanley v. Powell* (1891) 1 Q.B. 86.

ACTION FOR DAMAGES.

F. B. de Souza for the plaintiff.

R. S. Boswell for the defendant.

Cur. Adv. Vult.

Brown, J.: — At about 11 p.m. on the night of the 13th of November 1952 the plaintiff was shot by the defendant who was one of a party of three men shooting flying foxes. The plaintiff had been asked to accompany the party because he knew of a suitable place. The plaintiff was shot at a distance of 15 to 20 feet, and suffered serious injuries. The defendant called no evidence. But, on behalf of the defendant, Mr. Boswell submitted that the plaintiff was guilty of contributory negligence because "(1) he was a voluntary member of the shooting party; (2) when he knew that the shooters were on the point of taking up their shooting positions he should have taken the precaution of getting out of the firing-line." With regard to the first part of that submission, in fairness to Mr. Boswell I should perhaps say that a similar argument appears to have been advanced in the well-known case of *Stanley v. Powell*[1], though it has not, I think, been advanced since. It seems to me that it might as well be argued that a person who voluntarily takes a ride in a motor-car is guilty of contributory negligence if he is subsequently injured by the negligent driving of the driver. A gun, if used with proper care, is no more dangerous than a motor-car; a motor-car, if used negligently, can be no less dangerous than a gun. In regard to the second part of Mr. Boswell's submission, his idea of the "firing-line" is the line "through which the gun was raised in order to aim at the flying foxes overhead." I should have thought that, in the case of a careful shooter, the line of fire was the line from the barrel of the gun, when placed in the aiming position, to the target. I may add that at the moment when the shot was fired no flying foxes were overhead, or none within shooting range.

[The remainder of the judgment deals with the question of damages. The learned Judge awarded $5,173.50 by way of special damages and $9,800 for general damages, making a total of $14,973.50. — Ed. M.L.J.]

Order accordingly.

Solicitors for the plaintiff: *Battenberg & Talma.*

Solicitors for the defendant: *R. C. H. Lim & Co.*

KESARMAL & ANOR. v. VALLIAPPA CHETTIAR.

[Privy Council (Lord Tucker, Lord Keith of Avonholm and Mr. L. M. D. de Silva) February 2, 1954]

[Privy Council Appeal — No. 26 of 1952]

Duress — Occupation Period — Transfer of land — Transferee's knowledge of duress to be established — Titles to Land (Occupation Period) Ordinance, 1949, s. 27(1) & (5) — Land Code (Cap. 138), ss. 2 & 42 — Fresh evidence — Under what circumstances allowed — "Not indefeasible" — Does not mean void.

This was an appeal from the Judgment of the Court of Appeal (Murray-Aynsley, C.J. (Singapore), Abbott and Wilson, JJ., March 21, 1952) affirming the Judgment of Taylor, J. of the Supreme Court of the Federation of Malaya (reported in (1951) M.L.J. 117) in which the learned trial Judge set aside an instrument of transfer of land executed by the respondent on July 20, 1943, in favour of the appellants on the ground that it was obtained by duress within the meaning of section 27 of the Titles to Land (Occupation Period) Ordinance, 1949.

The appellants' application to adduce fresh evidence was refused both by the Court of Appeal and the Privy Council.

The transferee appealed against the decision of the Court of Appeal.

Before their Lordships of the Privy Council there were three questions for consideration, two of fact and one of law, which were decided by the Courts of the Federation of Malaya.

The two questions of fact were:—

1. Was the execution of the instrument of transfer of the 20th July 1943 by the respondent in favour of the appellants procured by duress within the meaning of section 27 of the Titles to Land (Occupation Period) Ordinance 1949?

2. If so, were the appellants at the time they took the transfer aware that its execution had been procured by duress?

The question of law was:—

If the second of the above questions be answered in the negative is the respondent nevertheless entitled to have the instrument set aside if its execution had been obtained by duress?

Held: (1) it is an essential condition that the fresh evidence which a party seeks to adduce was not available at the trial and that reasonable diligence would not have made it available. As there was nothing to prevent or even impede the appellants from producing such evidence at the trial, the application to adduce must fail. There being no other ground upon which the first finding was or could have been attacked the finding must stand; (2) there was ample material from which the inference

could be drawn that the appellants had knowledge of the exercise of duress; (3) that knowledge of duress on the part of the transferee must be established before a transferor can claim to be entitled to have an instrument of transfer which has led to the registration of a proprietor under the Land Code set aside on the ground of duress: and (4) the words "the title of a proprietor . . . . shall not be indefeasible" in section 27 of the Titles to Land (Occupation Period) Ordinance 1949 and in section 42 (ii) of the Land Code mean only that the title of the proprietor is liable to defeat.

The Judgment of the Court of Appeal affirmed.

Case referred to:—

(1) *Srimati Bibhati Devi v. Kumar Ramendra Narayan Roy* (1946) A.C. 508.

PRIVY COUNCIL APPEAL.

Kenneth Diplock Q.C. and *Rodger Winn* for the appellants.

Sir Frank Soskice Q.C., Dingle Foot and *Biden Ashbrook* for the respondent.

The judgment of the Privy Council was delivered by:—

Mr. L. M. D. de Silva : —This is an appeal from a judgment of the Court of Appeal of the Supreme Court of the Federation of Malaya dated the 21st March, 1952 affirming a judgment of the High Court of Kuala Lumpur in favour of the respondent dated the 22nd May, 1951. By the said judgment the respondent was held to be entitled to have set aside an instrument of transfer of land executed by him on the 20th July, 1943 in favour of the appellants on the ground that it had been obtained by duress within the meaning of section 27 of the Titles to Land (Occupation Period) Ordinance 1949.

The material part of sub-section (1) and sub-section (5), which are the only relevant sub-sections, are to the following effect:—

"27. (1) Notwithstanding the provisions of sub-section (i) of Section 42 of the Land Code or the corresponding provisions in the Land Enactment of any Malay State, the title of a proprietor, chargee or lessee . . . under any instrument executed during the occupation period shall not be indefeasible if the execution of such instrument was procured by coercion or duress:

Provided that nothing in this subsection shall affect the title of a subsequent proprietor, chargee, lessee or assignee who has taken *bona fide* and for valuable consideration from such first named proprietor, chargee, lessee or assignee or from any person claiming *bona fide* through or under him.

(5) Duress, for the purposes of any action brought to set aside an instrument or the registration of an instrument executed or effected during the occupation period on the ground of duress, includes—

(a) any force or injury applied or caused, or threat of force or injury offered, by an official of, or person on behalf of, the Occupying Power; and

(b) a threat (other than one ordinarily and lawfully made in the exercise of a legal right or remedy) made by a party to the transaction to inform an official of the Occupying Power of the refusal of the person concerned to execute an instrument or effect a registration,

which caused the person concerned to execute an instrument or effect a registration."

For the purposes of this judgment it is necessary to consider three questions, two of fact and one of law, which were decided by the courts in Malaya. The two questions of fact are:—

1. Was the execution of the instrument of transfer of the 20th July, 1943 by the respondent in favour of the appellants procured by duress within the meaning of Section 27 of the Titles to Land (Occupation Period) Ordinance 1949?

2. If so, were the appellants at the time they took the transfer aware that its execution had been procured by duress?

The question of law is:—

3. If the second of the above questions be answered in the negative is the respondent nevertheless entitled to have the instrument set aside if its execution had been obtained by duress?

The courts in Malaya arrived at concurrent findings on the facts. It was found that the respondent had made a series of loans to one Tungku Musa Edin, referred to in the judgments as "the Klana", who was the eldest son of Sultan Suleiman of Selangor. For various reasons a younger brother was appointed heir-apparent to the throne and succeeded to it on the death of Sultan Suleiman in 1937. When the Japanese occupied the country in 1942 they deposed him and installed the Klana as Sultan. Prior to the Japanese occupation the Klana had on more than one occasion in 1941 borrowed money from the respondent and furnished him with security. This he did by the indirect method of transferring to the respondent a certain land (with the buildings thereon) and obtaining at the same time an option to repurchase it for the amount repayable on the loan. This series of transactions came to an end on the 5th November, 1941 on which day, in consideration of the payment of a final amount of $5,000, the Klana, by the document P.3, surrendered his right to repurchase the property. The respondent thereupon became the absolute owner of the property and the Klana ceased to be his debtor. After he had been installed as Sultan in 1942 by the Japanese the Klana made a series of attempts to recover the property which were resisted by the respondent. Finally on the 9th July, 1943 the respondent was summoned to the Klana's residence. The Klana was there with two Japanese officers. The appellants were also in the building. The Klana told the respondent that he (the respondent) must sign forthwith an agreement to transfer the property to the appellants. On the respondent showing some hesitation one of the Japanese officers told the respondent he must obey the Sultan's orders. The respondent then signed the agreement. Eleven days later it was implemented by, among other things, the signing of the transfer impugned in this case.

For the purposes of the observations which they wish to make, their Lordships do not think it necessary to state the facts found in greater detail. Upon the first question the courts below arrived at the conclusion that the execution of the deed of the 20th July, 1943 had been procured by duress. In the argument before their Lordships it was not disputed that this conclusion is inevitable if the concurrent findings are allowed to stand.

The principles which guide the Board in dealing with concurrent findings on the facts have been set out in a judgment of the Board delivered by Lord Thankerton in the case of *Srimati Bibhati Devi v. Kumar Ramendra Narayan Roy*[1] and need not be repeated here. The Board declines to review the evidence for a third time unless there are special circumstances the nature of which are discussed in the case referred to. Counsel for the appellants sought to overcome this difficulty in relation to the question whether the execution of the deed had been procured by duress by asking their Lordships to take into consideration certain material which had not been adduced in evidence before the trial judge. The application was refused in the course of the argument. A similar application had been refused by the Court of Appeal and their Lordships would in any event have been reluctant to disturb the order made by the Court of Appeal in the exercise of its discretion. It is stated by the trial judge that at the trial "it was accepted that his (the respondent's) accounts are genuine, contemporary and well kept." The object of the evidence sought to be adduced was, according to counsel, to attack certain entries in the respondent's books of account which the trial judge had regarded as supporting his oral evidence that a sum of $5,000 had been paid in November, 1941 on the document P.3 referred to above by the respondent to the Klana as consideration for the surrender by the Klana of his right to purchase the property.

The exceptional circumstances in which a party seeking to adduce fresh evidence at the hearing of an appeal is allowed to do so are well known. It is an essential condition that the evidence was not available at the trial and that reasonable diligence would not have made it available. It appears from the "Case for the Appellants" (paragraph 14) that the material which is stated to be damaging to the respondent was discovered when the appellants' counsel in Malaya "after the conclusion of the trial and shortly before the hearing of the appeal" examined one of the respondent's books "more thoroughly" than he had done before. Counsel for the appellants at the hearing before their Lordships was constrained to admit that there had been nothing which had prevented, or even impeded, an examination before the trial of the respondent's books on identically the same lines as that which is stated to have been made after the trial. Consequently the condition referred to had not been satisfied and the application was refused.

There was no other ground upon which the concurrent finding that the execution of the transfer of the 20th July, 1943 had been procured by duress, was or could have been attacked and the finding must therefore stand.

The second question of fact which has to be considered is whether the appellants were aware at the time they became the transferees on the transfer of the 20th July, 1943 that it had been procured by duress. Upon this question also there is a concurrent finding of the courts below answering it in the affirmative. It was submitted that there was no evidence upon which this finding could be sustained and, further, that certain statements made by the trial judge in the course of arriving at it were contrary to the evidence given on behalf of the respondent.

Their Lordships are of the opinion that the facts which they have stated above and others deposed to by the respondent and his witnesses would, if accepted, furnish ample material from which the inference could be drawn that the appellants had knowledge of the exercise of duress. At the end of a passage in his judgment which begins "The next issue is whether the defendants were aware of the duress" the learned trial judge arrives at the conclusion "On the evidence as a whole, I find that the defendants personally knew of the duress." As there is evidence from which this conclusion can arise the main point of the appellants' submission fails.

Certain other statements in the passage referred to above have been the subject of criticism on the ground that they were contrary to the evidence. This criticism rests upon an interpretation, which is possible but not inevitable, of certain words in the evidence of one of the respondent's witnesses. Their Lordships do not feel disposed to deal with this criticism in detail because they are of the opinion that the contentions of the appellants on this subsidiary point if accepted would not be of weight sufficient to induce them to disturb the finding of the courts below.

It was not disputed that if both duress and knowledge of it by the appellants was established the respondent was entitled to succeed. It follows that upon what has been said so far the appeal should be dismissed.

The third question referred to above, namely, whether knowledge of duress on the part of the appellants was a necessary ingredient of the respondent's case, was argued fully before their Lordships. As it is one of importance in the application of the Titles to Land (Occupation Period) Ordinance of 1949, their Lordships have thought it would be useful to express an opinion upon it although upon the view of the facts they have taken it does not arise.

The parties to this case are agreed that the land which is the subject matter of this case is subject to the provisions of the Land Code of the Federated Malay States (F.M.S., Cap. 138). Section 2 of the Code defines "proprietor" thus:—

"Proprietor means the individual person, incorporated company or body corporate for the time being registered as the owner of land comprised in a grant or certificate of title or entry in the mukim register or as the lessee of State land."

The Code embodies a system of registration of title. It provides for the registration as proprietor, after compliance with certain formalities, of a transferee of land from an existing proprietor. By reason of the events set out above the respondent became the duly registered proprietor of the land some time prior to the Japanese occupation. As the result of the impugned deed of the 20th July, 1943 the appellants became the registered proprietors. The first four sub-sections of section 42 of the Code are to the following effect:—

"Section 42 (i) The title of a proprietor, chargee or lessee shall be indefeasible except as in this section provided.

(ii) In the case of fraud or misrepresentation to which he is proved to be a party the title of such proprietor, chargee or lessee shall not be indefeasible.

(iii) If the registration of any proprietor, chargee or lessee has been obtained by forgery or by means of an insufficient or void instrument such registration shall be void.

(iv) Nothing in subsections (ii) or (iii) shall affect the title of a proprietor, chargee or lessee who has taken *bona fide* for valuable consideration from any proprietor, chargee or lessee whose registration as such was procured by any such means or by means of any such instrument as aforesaid or of any person claiming *bona fide* through or under him".

It is not necessary to refer to the remaining sub-sections for the purposes of this case. It will be seen that the ultimate effect of section 27 of the Titles to Land (Occupation Period) Ordinance 1949 (set out earlier) was to add to sub-section (ii) of section 42 of the Land Code yet another set of circumstances on proof of which the "title of a proprietor, chargee or lessee shall not be indefeasible".

The appellants and respondent were agreed that to set aside an instrument of transfer on the ground of duress it would be necessary to establish two elements: (i) duress and (ii) knowledge of duress on the part of the transferee except in special cases provided for otherwise by statute. It was argued that section 27 made such statutory provision and that proof of duress as defined in the section, operating in the circumstances stated in it, was sufficient to destroy the title of a transferee registered as proprietor even if he had had no knowledge of that duress. This argument involved as an essential part the view that the words "shall not be indefeasible" meant "shall be void." Their Lordships do not think that the words "shall not be indefeasible" could in any case bear that meaning. Moreover the words "shall not be indefeasible" occur both in sub-section (1) of section 27 and in sub-section (ii) of section 42 and have to be accorded the same meaning in both places. Sub-section (iii) of section 42 says that in certain circumstances the registration of a proprietor "shall be void" and it would be most unusual if the totally different words "shall not be indefeasible" were used in sub-section (ii) to mean identically the same thing as "shall be void". Their Lordships are of the opinion that the words "the title of a proprietor ... shall not be indefeasible" mean that the title of a proprietor is liable to be defeated. Once duress within the meaning of the section is established the barrier against attack placed by sub-section (i) of section 42, which declares that in all but the excepted cases the title of a person registered as proprietor "shall be indefeasible", is lifted. His title is then vulnerable but has not been defeated. The Ordinance does not say how it can be defeated and consequently, to ascertain the way in which this can be done, recourse must be had to the ordinary law. Under that law knowledge on the part of the transferee is a necessary ingredient. Their Lordships are therefore of opinion that knowledge of duress on the part of the transferee must be established before a transferor can claim to be entitled to have an instrument of transfer which has led to the registration of a proprietor under the Land Code set aside on the ground of duress.

An argument was addressed to their Lordships based on the existence of the words "to which he is proved to be a party" in sub-section (ii) of section 42 which deals with fraud and misrepresentation. The implications that have been suggested as arising from the presence of these words are not strong enough to persuade their Lordships that the words "shall not be indefeasible" referred to earlier do mean "shall be void" or that they mean anything more than has been observed by their Lordships.

For the reasons given their Lordships will humbly advise Her Majesty that the appeal be dismissed. The appellants must pay the costs of this appeal.

Appeal dismissed.

Solicitors for the appellants: *Lawrance, Messer & Co.*
Solicitors for the respondent: *Barrow, Rogers & Nevill.*